



**KUTAKROCK**

kutakrock.com

# Social Media in the Workplace

**Kate Jones**

Partner

Kutak Rock LLP

[Kate.Jones@kutakrock.com](mailto:Kate.Jones@kutakrock.com)

402-231-8736

# Social Media in the Workplace



## Four Main Topics:

1. Information obtained through social media.
2. NLRB guidance for social media policies.
3. Recent decisions on terminations based on social media postings.
4. Privacy concerns.

# Social Media: Statistics

The Joy of Tech™

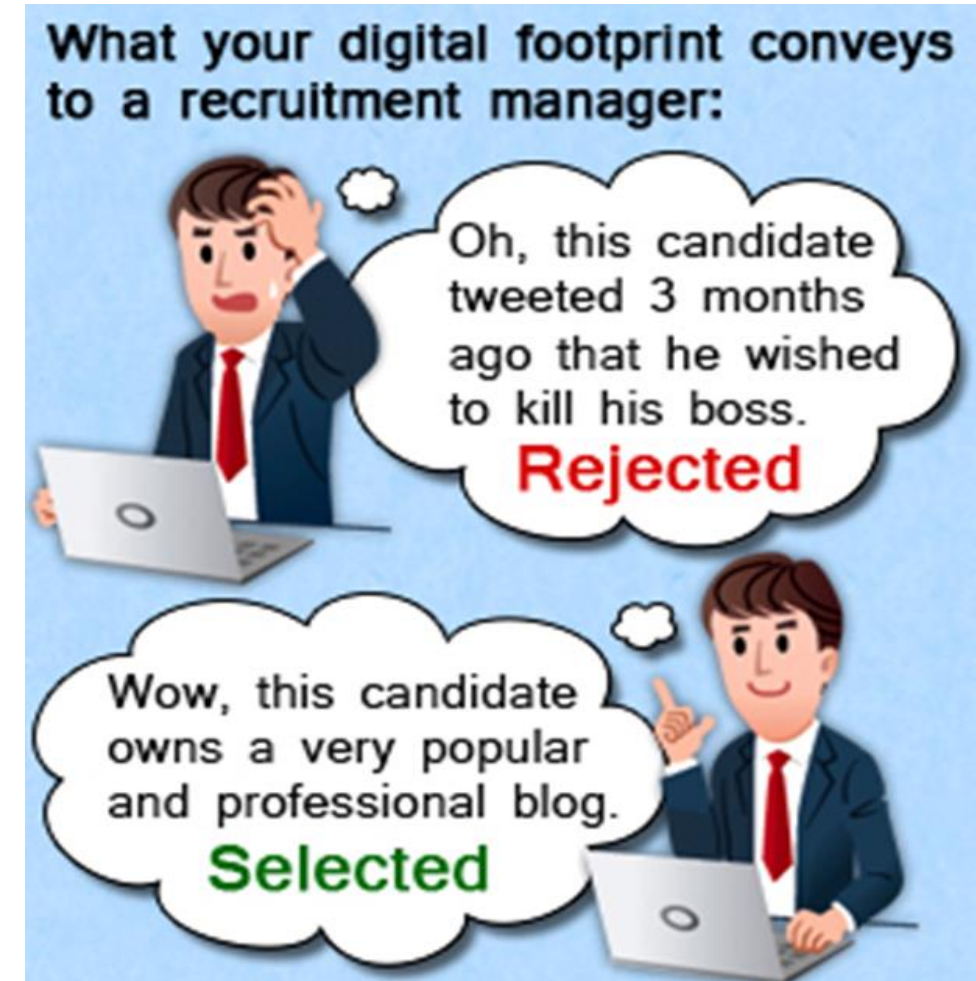
by Nitrozac & Snaggy



Signs of the social networking times.

# Social Media: Pre-Employment Screening

- Postings or pictures may indicate a candidate's poor judgment or immaturity.
- Pictures on social media sites may show how the candidate dresses or acts.
- Photos may show the candidate heavily intoxicated.
- Postings or pictures may show risk to workplace safety if there are signs of threatening behaviors or violent activities.





# Social Media: Sourcing and Recruiting



- Use of social networking sites to source and recruit job candidates.
- May be deemed discriminatory.
- Inadvertent collection of prohibited data, such as age, sexual orientation, religion, national origin, etc.
- May miss qualified candidates who are not part of the social networking scene.
- Information on social media may not be accurate.

# Social Media: Pre-Employment Screening

- Use of the Internet and social media as part of the pre-employment screening background check.
- Potential for discrimination claims.
- Pre-employment social media background checks may implicate the Fair Credit Reporting Act (“FCRA”).



# Social Media: Reference Checks

*Sweet v. LinkedIn Corporation*, No. 5:14-cv-04531-PSG, 2015 WL 1744254 (N.D. Cal. Apr. 14, 2015)

- Class action alleged LinkedIn’s “Reference Search” violated the FCRA.
- No violation occurred because:
  - ✓ The plaintiffs’ employment histories were not consumer reports.
  - ✓ LinkedIn was not a “consumer reporting agency.”
  - ✓ The search results came from people in the searchers’ networks, so the results did not bear on the plaintiffs’ character, general reputation or mode of living.
  - ✓ The search results were not used or intended to be used to determine eligibility for employment.

# Social Media: Sourcing and Recruiting



- Keep records reviewed and used in any employment decision.
- Use information consistently.
- Learn the “off-duty” laws in your state.
- Establish internal procedures.
- Review your employment policies.
- Designate a person to review social media.
- Don’t “false friend.”



# Social Media: Sourcing and Recruiting



- The NLRB's primary responsibility is to interpret and enforce the NLRA.
- The NLRA protects an employee's right to engage in "concerted activity."
- Employers must walk a fine line between prohibiting unwanted conduct and avoiding undue restrictions on protected activities.

# Social Media Policies: NLRB In Action

NLRB Office of the General Counsel Advice Memorandum, KMOV-TV, No. 14-CA-107342 (Jan. 6, 2014)

1. Adhere to Belo's company harassment and retaliation policies. It is the responsibility of employees to notify management and/or Human Resources immediately of possible sexual or other unlawful harassment without the concern of reprisal or retaliation. Do not post insulting, embarrassing, hurtful or abusive comments about other company employees online. Do not share pictures of other Belo Employees unless the other employee is comfortable with it. Belo expects its employees to treat their co-workers with respect and courtesy at all times.
2. Avoid the use of offensive, derogatory, or prejudicial comments.
3. Do not defame Belo companies, their employees, clients, customers, audience, business partners or competitors. Indeed you should avoid making defamatory or libelous comments and postings in general as others may attempt to impute these comments to your employer or you as an employee.
4. Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors, or customers.

# Social Media Policies: Blessed by the NLRB



NLRB Office of the General Counsel Advice Memorandum, Walmart, No. 11-CA-067171 (May 30, 2012)

- Policies should provide sufficient context and specific examples.
- Social media policies are not a “one size fits all” proposition.

# Social Media Policies: NLRB Guidance

Would your social media policy pass NLRB muster?

1. Are you using a generic, “cookie-cutter” policy?
2. Does your policy make clear that employees have the right to engage in protected speech?
3. Does your policy limit employee communications with the media?
4. Do you forbid employees from disclosing “confidential information” without defining it?
5. Does your policy contain specific examples of what is and what is not permitted?

## Social Media: Illegal Termination

*Pier Sixty, LLC & Hernan Perez & Evelyn Gonzalez*, Cases 02-CA-068612 and 02-CA-070797, 362 NLRB No. 59, 2015 WL 1457688 (Mar. 31, 2015)

***“Bob is such a NASTY MOTHER F\*\*\*\*\*R  
don’t know how to talk to people!!!!!! F\*\*k  
his mother and his entire f\*\*\*\*\*g family!!!!  
What a LOSER!!!! Vote YES for the  
UNION!!!!!!!”***



# Social Media: Legal Termination

*Richmond District Neighborhood Center and Ian Callaghan*, No. 20-CA-091748, 361 NLRB No. 74, 2014 WL 5465462 (Oct. 28, 2014)

*“[W]e’ll take advantage, play music loud, get artists to come in and teach the kids how to graffiti up the walls and make it look cool, get some good food. I don’t feel like bein their b\*\*\*h and making it all happy-friendly-middle school campy. Let’s do some cool s\*\*t, and let them figure out the money. No more Sean. Let’s f\*\*k it up.”*

# Social Media: Privacy Concerns

- State laws protecting online privacy and employees' lawful off-duty conduct.
- Federal laws.
- First Amendment concerns.



# Social Media: Statutes

- State legislation preventing employers from requesting passwords to personal Internet accounts.
- Electronic Communications Privacy Act (“ECPA”), 18 U.S.C. § 2511 et seq.
  - Business purpose exception.
  - Consent exception.
- Stored Communications Act (“SCA”), 18 U.S.C. § 2701 et seq.

# Social Media: Off-duty Conduct Laws

- State laws prohibiting employers from disciplining employees for their lawful off-duty conduct.



# Social Media: First Amendment Considerations

*Grutzmacher v. Howard Cty.*, 851 F.3d 332 (4th Cir. 2017)

Battalion Chief was watching news coverage of a gun control debate in his office and posted the following to his Facebook page while on duty:

- *My aide had an outstanding idea .. lets all kill someone with a liberal ... then maybe we can get them outlawed too! Think of the satisfaction of beating a liberal to death with another liberal ... its almost poetic ...*

Twenty minutes later, a volunteer paramedic replied with the following:

- *But .... was it an assault liberal? Gotta pick a fat one, those are the high capacity ones. Oh ... pick a black one, those are more scary. Sorry had to perfect on a cool idea!*